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FUNDS. and James duly sworn, nembers of the of the State of th day of Jan. '05' ascertained from ate Centroller the that should be in an official examicount of the money and vouchers for meney in the State Treasury of Nevada and found the same

correct as follows: Cain \$288,280 74 Paid coin venchers not returned to Controller 111,112 18

State School Fund Securities. Irredeemable Nevada State School bend Mass. State 3 per cent 537.000 00 bonds Nevada State Bonds 253,700 00

Total

Mass. State 31/2 per cent 313,000 00 bonds

United States Bonds 215,000 00 Total 2,093,092 92 W. G. Douglass

James G. Sweeney Subscribed and sworn before me this

29th day of January, A. D. 1906. J. Doane, Notary Public, Ormsvy County, Nev.

For Sale,

Two quartz wagens, one weed and one low wheel wagen, also harness letter of the statute. But not so if six horses. House, bara and fine

IN THE SUPREME COURT OF THE STATE OF NEVADA.

Ebenezer Twaddle and Ebenezer Twaddle as Special Admr., of the Estate of Alexander Twaddle, de-Plaintiffs and Respondents

399,392 92

Theodore Winters, A. C. Winters, L. W. Winters and Samuel Longa-

Defendants and Appellants From 2d Judicial District Court, Wash-

700,763 50 Messrs. Cheney and Massey, attorneys for Plaintiffs. 1,769,534 52

Alfred Chartz, attorney for Defend-

DECISION The respondents have moved to dismiss the appeal from the judgment because it was not taken within one year, and to dismiss the appeal from the order of the district court denying appellants motion for a new trial, also to strike from the records the state-1,983 84 ment on motion for a new trial, upon 1,983 84 the ground that the statement was not filed within the time prescribed by law. The appeal from the judgment is dismissed because not taken until March, 1905, more than one year after its rendition on June 23. 1903. On that day Judge Curler of way, New York. the Second Judicial District court who had tried the case at Reno and rendered the decree, made in open court and had entered in the minutes an order "that all business and all cases and proceedings that have not been completed or in the process of 372,878 63 completion, and all new business that may be brought before the court during the absence of the presiding judge. be referred to Judge M. A. Murphy of the first judicial district court of 2,334,054 95 the State of Nevada, and that he be 905 4,939,736 68 requested to try, determine and dispose of all cases and business now before the court in the absence of the judge of this district."

Pursuant to this request Judge Murphy occupied the bench in Reno until July 31, 1903, when a recess was taken until a further order of the court There was no other session until Judge Curler's return on August 17th. On July 17th, Judge Murphy, in open Life Insurance court in Reno, made an order allowing plaintiff until August 15th in which to file objection to findings, ...\$75,726,669 64 and prepare additional findings.. On August 3d Judge Murphy at Carson ... 71,006.041 60 City, and within his own first judicial district, by an ex parte order ... 14,200,241 58 made without affidavit of Judge Cur-3.626,195 06 ler's absence or inability, granted the defendants until September 15, 1903. within which to prepare, file and serve their notice and statement on 5,000,353 17 motion for a new trial. Later extensions were made by Judge Curler, but ... 2,339,570 21 whether they are effectual depends s... 114,408 00 upon this order, which respondents 3.358.195 17 claim Judge Murphy was unauthorized 10,812,526 55 to make under Section 197 of the Practice Act which provides in regard 69,195,442 60 to notices and statements on motions 2,810,859 59 for new trial that "the several periods 2,845,460 25 of time limited may be enlarged by the written agreement of the parties, 32,500 00 or upon good cause shown, by the 4,392 94 court, or the judge before whom the case is tried." and under district court rule XIIII which directs that "no judge, except the judge having charge of the cause or proceeding shall grant further time to plead, move, or do any act or thing required to be done in any cause or proceeding, unless it be 3.028,823 54 shown by affidavit that such judge is absent from the state, or from some 1,839,797 95

other cause is unable to act." Rule XII provides: "When any district judge shall have entered upon the trial or hearing of any cause or proceeding, demurrer or motion, or made any ruling, order or decision therein, no other judge shall do any act or thing in or about said cause, proceeding, demurrer or motion, unless upon written request of the judge who shall have first entered upon the trial or hearing of said cause, proceed-

ing demurrer or motion." Section 2573 of the Compiled laws, passed after section 197 of the Practice Act as quoted, enacts: "The district judges of the State of Nevada shall possess equal coextensive and concurrent jurisdiction and power. They shall each have power to hold court in any county of the State. They shall each exercise and perform the powers, duties and functions of the court, and of Judges thereof, and of Judges at Chambers. Each judge shall have power to transact business which may be done in chambers at any point within the State. All of this section is subject to the provisions that each judge may direct and present. control the business in his own district, and shall see that it properly performed."

We think under the minute order and circumstances related, the power inherent in Judge Curler to extend the time of filing the notice and statement became conferred upon Judge Murphy during the former's absence, and that Judge Murphy became the Judge in charge, endowed with the authority to grant the extension without the presentation of the affidavit showing the absence or inability of Judge Curler, as the rule requires before the order can be made by a Judge not having the business in charge.

Judge Curer's absence was presumed to continue until his return was shown and consequently Judge Murphy's authority based upon that absence would likewise continue. It is said that under the first statute mentioned, the language that "the court or judge before whom the case was tried" may extend the time invalidates the order, because Judge Murphy was not the judge before whom it was tried, and that he was not the court after he returned to Carson City, where he made the order. In a nar row technical sence this may be true. if we do not look beyond the strict we consider the intent and purpose of the enactment, and construe it in the terruption except in 1887, 1898 and

light of reason as applied to the or- at the the ently the object of this legislation was tron in

der this contention if he had stepped through the door into the chambers and made it, it would have been void. Orders extending the time for filings Section 2573 can and ought to be made as effectually in any part of the State by the judge having the case in during his vacation, but by analogy the construction claimed, if adopted, would, in every case where a district judge dies, resigns or is succeeded, invalidate the orders extending time under section 197 made out of court by his sucessor in office, although they are of that character ordinarily granted in chamoers. This would mean a distinction and two rules for filing orders of the same kind, and that the judge who had tried the cause as Judge Curler had done in chambers, while his successor could him, and would have to be in court to make these simple orders extending time in actions which had been

previously tried by another judge. Appellants desired and were entitle ed to the time granted for the purpose of enabling them to secure from the court reporter who had left the State, a transcript of the testimony given on the trial, which would enable them to properly prepare the state-

men! Under Section 2573 Judge Curler could have made an order granting them the extension at any place in the State, and as during his absence Judge Murphy was requested by the Court minutes to attend to all business for him, we conclude that he was empowered to make the order at Car son City as he did, and as Judge Curler could have done, and that it was not necessary for him to make the trip to Reno and undergo the formality of opening court to enter ex parte orders simply extending time, such as are

usually made out of court. The motion to dismiss the appeal from the order overruling the motion for a new trial and to strike out the statement is denied.

ON THE ME.ITS

This action was brought by Alexander Twaddle in his life time and by Ebenezer Twaddle, as co-owners, for 450 miners inches running under a six inch pressure of the waters of Ophir riated by their grantors in the year for the judgment for the 34 inches a flume" for the irrigation of their ranch containing 203.92 acres in Washoe county. The answer denies the allegation of the complaint sets up the ownership by the defendants, Winters, of a tract of land obut one mile wide and two miles long, and alleges appropia..ons by them or their grantors aggregating 600 inches flowing under a four inch pressure, by the year 1867, which are stated to be prior to any diversion of the water by the plaintiffs, and asserts a claim for isfendant. Longabaugh, to 180 inches for fluming wood, lumber and ice from large tracts of timber lands owned by him, and for domestic use and irrigating garden on forty acres at Ophir.

Witnesses appeared to sustain, and others to dispute plaintiffs' right as initiated a half century ago, and the same is true regarding the claims of these defendants. The record affords a glimpse of pioneer history at a period previous to the admission of this State into the Union, and portrays the building and decay of saw and quartz mills and the rise and decline of towns by the banks of the stream the waters of which are here in litigation. One witness testified that the Hawkins ditch, now known as the upper Twaddle ditch, was completed in 1857, and that he turned the water into it that year. Others stated that water was running in the ditch and flume about that time, and that these were aparently in the same place and of about the same capacity as "t

On behalf of the defendant other witnesses testified that they were over the ground and saw no ditch and that none existed there during those earlier years. It is unnecessary for us to detail the conflicting portions of the evidence. These were carefulfully considered by the district court, and for the reasons stated in its decision, enforced by statements in deeds made many years before any controversy arose, the finding that this ditch was constructed and a prior appropriation of water made through it in-1857 finds ample support. At first on the Twaddle ranch land was plowed for only a garden and a small piece of grain and but little hay was cut. A reasonable time was allowed in which to extend and complete the use of the water that would flow through the ditch and the quantity of land irrigated was increased. The lower Twaddle ditch was constructed from Ophir Creek at some time prior to 1869 and runs to and irrigates the eastern portion of the plaintiffs ranch 't is shown that since that year at least their lands have been in practially the same state of custivation and irrigation that they were in at the ime of the commencement of this ection, and that during that period plaintiffs' used all the water they

weight to the later section. Appar- materially increa ed their opprop is-

to prevent the granting of extensions Theodore winters admitted upon the which they had not tried or which teen year a le had been using twice as the plaintiff, because he ran the were rendered. inability of the judge who tried the he used during the first ten years that joined with the other defendants in United States, Congressman Needham action, to grant relief, or allow ex- he cultivated his lands. As he claims answering and resisting the rights of testified that irrigation had doubled tensions to be made to deserving liti- and uses more than the plaintiffs, we plaintiffs. The decree does not pro- and trebled the value of property in The argument advanced concedes his diversion of the waters of the The argument advanced concedes his diversion of the date of the awarded to plaintiffs. Nor does it ir doctrine of riparian rights and under Reno and entered the order in open oppropriation which has remained court it would have been good, but un- stationary may account for the shortage and dispute.

By consent of the parties in open court the district judge, accompanied by a civil engineer who had testified are business usually, or properly as a witness for the defendants, viewtransacted in chambers and under ed the premises and made measurements. At the point of least carrying capacity of the upper Twaddle ditch, which is the old square flume charge, as if made by him in cham- near the Bowers' Mansion and grave, bers or in open court. Judge Murphy he measured the flow at 184 inches was merely acting for Judge Curler and the water lacked more than two inches of reaching the top. A surveyor had testified for the plaintiffs that its capacity was 182 inches at this point, and that the capacity of 100 feet of old flume remaining up nearer the head of the ditch which had been impaired by age and abandoned, and supplanted by a new V flume built above the old one by the plaintiffs in 1900, was 150 inches. At this point the judge found that 191 inches of water which he had measured below about filled the new V this instance, could make the order in flume, and he estimated that the old flume would carry from 200 to 300 inso make it only in the cases tried by ches. From his examination of the premises and the character of the soil the court was of the opinion that the plaintiffs required, and were entitled to, at least the amount of water they had flowing in the flume at the time he made the examination, and he dacreed them a prior right to 184 miners inches running under a four inch pressure or 3 34-50 cubic feet per second from April 15th to Nov. 15th of each year, and 20 inches or 2-5 of one cubic foot per second for domestic ise and watering stock at other times. It is claimed the amount allowed is not warranted by the evidence because more than the capacity of the upper Twaddle ditch as shown by the testimony mentioned fixing it at 182 inches at the point above the mansion, and at 150 inches along the 100 feet of old flume. through which the water flowed prior to 1900.

It is not necessary to determine whether the court on its own examination and measurement may allow a quantity beyond the range of the evidence, nor whether the surveyor could actually estimate the capacity of the 100 feet of old flume without knowing the volume and velocity of the water that entered it, nor whether the variation of one part in ninetyone or the difference between 18? inches in his measurement and that of 194 by the judge should be disregarded as too trifling to be material and as a slight discrepancy to be expected, "by means of dams, ditches and which defendants' claim should be deacity of the upper ditch and flume before the construction of the V flume in 1900 is suported by the finding of their granters had for more than thirty-one years before the commencement of this suit used a portion of the water through the lower Twaddle ditch. It is urged that 184 inches is more than required for the irrigation of plaintiffs' ranch and that this is especially so because a few of their 170.45 acres of cultivated land lies above the upper ditch from Oph'r swampy. The quantity of water allowed by the decree seems very liberal, both for irrigation and for domestic use and watering stock. Engineers and others testified that one half and three fifths of an inch of water per acre was sufficient, while for the plaintiffs, farmers from the vicinity varied in their estimates of the amount necessary from one and

one half to three and one half inches per acre. The evidence indicated that the plaintiffs had used as much water as that awarded to them and more, and had uniformly produced good crops Much of their hand is sandy with eousiderable stope. After examining the soil and viewing the quantity of water as it ran on the premises, the court agreed with the testimony of the plaintiffs that that amount was necessary and adopted a mean between the highest and lowest estimates. The quantity of water requisite varies greatly with the soil, seasons,

crops; and conditions, and we cannot say that the allowance is excessive. Alexander Twaddle testified that there were times during the summer. evidently short periods after the land had been irrigated, when it was not necessary to use as much as the unper ditch full of water. On such occasions and whenever it is not neeled by the plaintiffs it should be turned to the defendants, if they have any beneficial use for it, and not permitted to waste. It may be implied by the law, but it is better to have decrees specify, and especially so in of streams which may be unobjection this case, in view of the testimony stated and of the perpetual injunction. that the award of water is limited to a beneficial use at such times as it rains are frequent and fogs and winds is needed, Gotelli v. Cardelli. The point and purpose of diversion may be changed if such change does not interefere with the prior rights.

Under the testimony of Alexander Twaddle that the irrigating season loses about the first of October, and that sometimes he, used water a little later, we think probably the decree should limit plaintfffs' right for irrigating purposes to October 15th. This may allow defendant Longabaugh to flume wood a month earlier at this season when the water is low, needed from Ophir Creek without in. and allow Winters more for watering Legislature have recognized the ad-

provided he does not diminish the flow to which plaintiffs are entitled.

"one-third of that certain water ditch ditch, leading from what is now in force now in that State. known as the Ophir Creek to the land of said Twaddle, southerly from said fendants the waters of the stream as creek through the lands of C. F. Wooten and M. C. Lake, with the the land along its banks prior to privilege of running water through 1864. said flume and ditch to what is known | The case will be remanded for a as the Bowers Mansion or grounds, new trial unless there is filed on the the expense of maintaining said part of the plaitning within thirty ditch and flume to be paid by each in days from the filing hereof, a written proportion to their interests in same." consent that the judgment be modi-It will be noted that this language fied by limiting the use of the 184 indoes not purport to grant any water, ches, or 3 34-50 cubic feet per second but rather the right to convey water of water awarded to the plainting, of and that it amounts to a sale of a such times as may be necessary third interest in the ditch with at the irrigation of their crops or lands least the privilege to that extent of or for other beneficial purposes, herunning in it water which Lake had, tween April 15 and October 15 of or might appropriate. Later, the defendant Theodore Winters, acquiret the Bowers Mansion and grounds inches awarded to them, when necesthrough conveyances which did not sary for their household, domestic and mention any interest in this ditch, it does not appear that Lake or his grantors ever made any use of the

Alexander Twaddle stated on ir stand that he did not claim all this ditch and that the plaintiffs owned Bowers land when it was never used ed. for its irrigation, and later passed with the land without being mentioned, and whether after the lapse of twenty-five years without any use or contribution towards its repair the grantee of Lake has a third interes: as a co-owner in the ditch and that part of the flume which has not becasuperceeded by the new one built by plaintiffs, are questions which we need not determine, for they, and that part of the judgment of the court which gives the plaintiffs the "excluand Flume," are not within the allegations of the pleadings which contain no reference to the exclusive us? of, or a third or any interest in the

ditch. Under the assertion in the complaint of the apropriation of water "by means of certain dams, ditches ditches running to their lands. They would have that right in the upper ditch if their interest in it is only fendants in the lower ditch, but whether the grantee of Lake owns and can assert a right to an undivided one-third interest, is a question mansion, and one which ought not to be determined by the judgment in the absence of any issue or allegation concerning it. The defendants speri-Creek and a small portion is natura'tv fically excepted to finding number twelve in this regard. Patents for defendants' lands lying

along the banks of Ophir Creek were issued to their grantors before the passage of the Act of Congress of July 26, 1866 and it is asserted that Co School Fund Dist. 4.....24 00 for this reason a vested Common State School fund, Dist. 1..2605 00 Law siparian right to the flow of the waters of Opnir Creek accrued of which they could not be deprived by that Act If this were true defendants State School fund, Dist 4 ... 165 00 might as well be considered under Special building5850 00 the circumstances shown to have lost that right by acquiescence in the continued diversion of the water by plaintiffs for a period many times longer than that provided by the statute of limitations, but in this contention counsel is in error. We do not wish to consider seriously or at length an argument by which it is sought to have us over-rule well reasoned decisions of long standing in this and other arid states, and in the Supreme Court of the United States, such as Jones v. Adams, Reno Samplin Works v. Stevenson and Broder 7. Water Co., declaring that this statute was rather the voluntary recognition of a pre-existing right to water constituting a valid claim to its continued use, than the establishment of a new one. As time passes it becomes more and more apparent that the law of ownership of water by prior appropriation for a beneficial purpose is essential under our climatic conditions to the general welfare, and that the Common Law regarding the flow able in such localities as the Britis! Isles and the coast of Oregon, Washington and northern California where laden with mist from the acean prevail and moisten the soil, is unsuitable under our sunny skies where the lands are so arid that irrigation is required for the production of the crops necessary for the support and prosperity of the people. Irrigation is the life of our important and increasing agricultural interests which would be strangled by the enforcement of the riparian principle.

Congress is apropriating millions for storage and distribution and our stock without material injury to the shove for use in irrigation instead or someted as teal not seemand W

plaintiffs. Although his flume was having it flow by lands of riparian dinary rules of practice, and give due appears that the plaintiffs' had not erected many years ago Longabaugn owners to finally waste by sinking and did not show any prior appropriation evaporating in the desert. The Cailand the decree properly enjoins him fornia decisions cited for appellants from interfereing with that part of may no longer be considered good and the meddling of judges in cases stand that during the last ten or fif- the water of Ophir Creek awarded to law even in the state in which they were not properly under their control, much water from Ophir Creek in ad- water in his flume past their ditta. In the recent case of Kansas v. Coloand yet in the case of the absence or dition to tha form other streams, as and into one owned by Winters, and rado before the Supreme Court of the

conclude that this large increase in vent him from taking any water in Fresno and King countries, Califorthe creek in excess of the amount nia,, that they nad to depart from the any way interefere with the water be- that doctrine it would be difficult of longing to him coming from other make any future development; that sources. This he may turn into there has been a departure from the Ophir Creek and take out lower down principles laid down in Lux v. Haggin, because at that time the value of On May 30, 1877, John Twaddle, the soin has been practically reversed by water was not realized, that the decifather and predecessor in interest of the same court on subsequent occathe plaintiffs, conveyed to M. C. Lake sions, and that the doctrine of prior appropriation and the application of and flume known as the Twaddle water to a beneficial use is in effect

We must decline to award the deriparian proprietors and patentees of

ach year, and by allowing plaintiffs for the remainder of the time the 20 stock purposes, and by striking from the decree the words:

"It is further ordered, adjudged and ditch or ever contributed towards its decreed that said plaintiffs have the exclusive right to use and the exclusive use of said Upper Twaddle Ditch and Flume at all seasons of the year. If such consent is so filed the aistwo thirds of it. Whether under this trict court will modify the judgment deed the one-third interest in the accordingly and as so modified the

ditch became appurtenant to the judgment and decree will stand affirm-Talbot, J. We concur: Fitzgerald, C. J. Norcreee J. Quarterly Report. Ormsby County, Nevada. Receipts. Filed Feb. 1, 1906. Balane in County Treasury at end of last quarter ... \$40023 36% Fee of Co. officers......531 40 Rent of county bldg......250 00

1st. Instalment taxes.....14924 21% and a flume" the court properly de. Slot machine license......282 00 ater through either or both the Semi-Annual Set. State Treas 531 78 Delinquent taxes......23 8014 61,077 36% Disbursements.

> Salary fund2390 00 Agl Assn. Bond Fund, Series A. \$100.00250 00 Agl. Assn. Bond Fund, Series B \$1,00.00400 00 Co. School Fund. Dist. 1 388 95 Co. School fund, Dist. 2.....151 20 Co. School fund Dist. 3......30 70 State school fund, Dist 2...160 00 State School fund, dist.3 ...120 00

School library, No. 2.......86 Of 21,968 59% Total Re pitulation. Cash in Treasury October 190540023 36% Receipts from Oct. 1st to Dec 30, 190521054 00% Disbursements from Oct. 1st to Dec 30, 190521968 5914 Balonce cash in County Treas.

January 1, 1906...... 39108 775 H. DIETERICH, County Auditor, Recapitulation Co. School fund3248 78 Co. Schood Dist. 1, fund. .7688 2214 Co. School Dist. 2, fund 139 64 Co. School Dist. 3, fund 190 2614

Co. School Dist. 3, fund.....425 55 State School Dist. 1, fund...1608 04 State School Dist. 2, fund.....77 54 State School Dist. 3, fund...271 29 State School Dist. 3, fund...371 35 State School Dist 4, fund 19 2> Agl. Assn. Fund A.........680 824 Agl. Assn Fund, B......86 861 Agl. Assn Fund Special...1918 96 Co. School Dist. fund - special

Co. School Dist. fund 1, library Co School Dist. fund 3, library £ 50

Co. School Dist fund 4, library 39108 77%

H. B. VAN ETTEN
County Treasure County Treasurer